



DEPARTMENT OF THE NAVY

BOARD FOR CORRECTION OF NAVAL RECORDS

2 NAVY ANNEX

WASHINGTON DC 20370-5100

SMC

Docket No: 05486-97

14 January 2000

From: Chairman, Board for Correction of Naval Records  
To: Secretary of the Navy

Subj: GYSC [REDACTED], JR., U [REDACTED]  
REVIEW OF NAVAL RECORD

Ref: (a) Title 10 U.S.C. 1552

Encl: (1) DD Form 149 dtd 16May97 w/attachments  
(2) HQMC PERB memo dtd 18Jul97  
(3) BCNR ltr dtd 25Aug97  
(4) Dir, SNCOA ltr dtd 15Sep97 w/encls (1) and (2)  
(encls (3) - (10) forwarded with docket no. 03216-97) and  
first and second ends  
(5) Memo for Record dtd 13Aug98  
(6) BCNR ltrs dtd 18Dec98 and 24Jun99  
(7) Dep Dir, Enl PME, Mar Corps Univ ltr dtd 23Nov99  
(8) E-mail from Mr. [REDACTED] dtd 29Dec99  
(9) BCNR case docket no. 03216-97  
(10) Subject's naval record  
(11) E-mail from Chairperson PERB dtd 11Jan00

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed written application, enclosure (1), with this Board requesting, in effect, that the applicable naval record be corrected by removing therefrom the fitness report for 9 January to 2 March 1995. A copy of this report is at Tab A.

2. The Board, consisting of Messrs. Leeman, Lippolis and Swaren's, initially reviewed Petitioner's allegations of error and injustice on 12 August 1998, and determined that additional information should be solicited. On 8 December 1999, the Board again determined that additional information should be sought. This panel of the Board completed their deliberations on 11 January 2000. Pursuant to its regulations, the Board determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of enclosures (1) through (10), naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies which were available under existing law and regulations within the Department of the Navy.

b. The contested fitness report was presented to Petitioner while he was a student, in the grade of staff sergeant, at the Staff Noncommissioned Officer Academy (SNCOA) Advanced Course 2-95. The reporting senior, the Director, SNCOA, states that Petitioner involved himself with six other students in plagiarizing the Judge Advocate General Manual (JAGMAN) investigation evaluation, which resulted in disenrollment for all involved parties.

c. Petitioner believes that the events and circumstances which led to his disenrollment from the advanced course class 2-95 were unjust. He states that he was not involved in plagiarism as alleged, but merely misunderstood guidance given in relation to an assignment to complete a JAGMAN investigation exercise. He provides supporting statements from other members of the class, including the class commander (enclosure (2) to his application).

d. The reviewing officer commented that Petitioner is incorrect in contending that the students were allowed to work together, therefore, what he did was acceptable. The reviewing officer stated that students were told they could help each other, but each student was expected to submit an original written evaluation. He said the evaluation submitted by Petitioner was almost word for word the same as the others submitted. The reviewing officer stated Petitioner's contention that the whole class did the same as he and his group did is not correct. The reviewing officer noted that "Assisting each other with format, etc is different from taking another's work and claiming it as your own." Finally, the reviewing officer felt that the Director used prudent judgment in this matter and was correct in his decision to disenroll Petitioner.

e. Petitioner is represented by counsel, who gave the statement at enclosure (9) to Petitioner's application. Counsel states that he contacted the school to retrieve Petitioner's academic records, particularly the JAGMAN investigation evaluation. He relates that a master sergeant, described as the "archivist" for the school, advised that the records for Class 2-95 had been shredded because of the mistake of a lance corporal. Counsel states that while the master sergeant took pains to apologize for the mistake, he was quick to acknowledge how bad this mishap must look in light of the academic problems in the class. Counsel expresses the opinion that this looked like a cover-up, and in light of this, no one would ever be able to get to the bottom of the matter. Counsel states that, ironically, the next day he received a facsimile of Petitioner's JAGMAN investigation evaluation from the master sergeant. Additionally, he says he was informed that the **only** remaining records from Class 2-95 were the JAGMAN investigation evaluations from the seven students who were disenrolled. Counsel states it is obvious there is no way ever to find out exactly what has happened. He says those in a position to explain this situation and provide the documents necessary for any accurate evaluation have "fortuitously" destroyed the records. He suggests it seems an all too convenient coincidence that they did retain what they believe to be the "'damning'" evidence. Finally, he objects that Petitioner was not given the five days to which he was entitled, under applicable instructions, to rebut the contested adverse fitness report.

f. Enclosure (2) is the report of the Headquarters Marine Corps (HQMC) Performance Evaluation Review Board (PERB) in Petitioner's case. The report reflects the PERB decision to deny Petitioner's request for removal of the contested fitness report. PERB stated that while Petitioner may not have been provided five days to submit his rebuttal, his comments attached to the report "succinctly state his concerns." They stated the reviewing officer thoroughly resolved his concerns and issues and, in the final analysis, concurred with the reporting senior's decision to disenroll Petitioner. PERB asserted the reporting senior "merely reported the facts, nothing more or less." PERB further stated that unless and until a formal fact-finding investigation determines that Petitioner's disenrollment, as well as the disenrollment of the six other SNCO's, was incorrect and unjust, removal of the fitness report is simply not warranted.

g. In an effort to obtain the information the Board desired, the Board's staff sent the letter at enclosure (3) to the Director, SNCOA, requesting the following:

- (1) Identify the six other students disenrolled from Advanced Course Class 2-95 for the same reason as Petitioner, and indicate their race.
- (2) Identify any students who were dropped from Advanced Course Class 2-95 for other reasons, and indicate their race.
- (3) Identify the members of Advanced Course Class 2-95 who were not disenrolled, and indicate their race.
- (4) Indicate whether the reporting senior of record completed his full tour.
- (5) Describe in detail the instructions given to students of Advanced Course Class 2-95 regarding the JAGMAN investigation exercise, including comment on the potential for misinterpretation in connection with copying the work of others.
- (6) Provide, if available, copies of the JAGMAN investigation exercises submitted by Petitioner and the other students disenrolled from Advanced Course Class 2-95 for the same reason as Petitioner.

h. The Director's letter in response is at enclosure (4). The Director, a sergeant major, identified the six other students disenrolled for the same reason as Petitioner, indicating their race as "N." The Director identified only one other student who was dropped from the class for other reasons; and he included a roster of all members of the class who were not disenrolled, indicating their sex, ethnic background, and race. The Director stated that he, the reporting senior of record, assumed duties as the Director on 26 May 1993 and would relinquish those duties on 19 December 1997. The Director also submitted a statement from the gunnery sergeant class instructor, which had been previously submitted in response to an inquiry from Petitioner's parent command. The class instructor states that he told the whole class to work together and help each other out "only as far as the format is concerned." The

instructor further states that he also advised the class that there was no reason to copy, being that there were approximately 145 plus findings of fact to be extracted from enclosures provided. He states he further advised the class of the possibility of coming up with the same findings of fact as someone else, but such findings should be written in the individual's own words. Commenting on the class instructor's statement, the Director stated it clearly indicates the guidance from the instructor was that students could assist each other in certain areas where format was concerned, and he added that an example of the "Format" was contained in student handout materials. The Director stated the intent was that assistance should be provided only by pointing out errors in format and spelling, and not by doing the actual work in preparation of the assignment. The Director asserted that the potential for misinterpretation in connection with copying the work of others was negligible, considering that of the 105 JAGMAN investigation evaluations submitted by the students of Class 2-95, only the seven in question reflected plagiarism. The Director furnished copies of the JAG Manual investigation evaluations prepared by Petitioner and the other students disenrolled from the class for the same reason. The Director further stated the facts indicate that a gunnery sergeant originated the JAGMAN investigation evaluation and willingly provided his completed work, via computer disk, to the others individuals involved. He said a comparison of the seven assignments revealed they were essentially identical, to include punctuation and spelling errors. Finally, he reported that the similarity initially came to the attention of the instructor because the student number, 1-10, displayed in the standard subject identification code of a gunnery sergeant class member's JAGMAN investigation evaluation was in actuality the student number of another gunnery sergeant.

i. After receiving the information at enclosure (4), the Board deferred decision on 12 August 1998 to try to obtain the JAGMAN investigation evaluations of the students who were not disenrolled, and to give Mr. Swarens a chance to try to get input from HQMC personnel concerning the fairness of the disenrollments. The memorandum for the record at enclosure (5) shows the Board's staff contacted the Director of Records at the SNCOA requesting the evaluations of all members of Class 2-95, and was advised "no files available, files are maintained for 2 years." Enclosure (5) further reflects that [REDACTED] advised the Board's staff that the JAGMAN investigation exercise had been discontinued. By correspondence at enclosure (6), the Board's staff asked the President of the Marine Corps University for information on when and why the exercise had been discontinued. The response at enclosure (7), from the Deputy Director, Enlisted Professional Military Education, Marine Corps University, a master gunnery sergeant who was the same individual referred to in counsel's statement as a master sergeant/school "archivist," confirmed that the exercise had been discontinued at the SNCOA Advanced Course in 1996, but reported that they had no record as to why.

j. On 8 December 1999, the Board again deferred decision to enable [REDACTED] try to obtain testimony from other members of Class 2-95.

k. By the E-mail at enclosure (8) [REDACTED] reported his findings. He stated that 14 members of Class 2-95 had been contacted and asked to give a brief synopsis of the

information provided to the class; that the 14 members polled all agreed that the instructions given were that they could work together to accomplish the task; that with the exception of a couple of the Marines polled, they were all basically surprised or shocked at the expulsion, inasmuch as it was not a graded event; that many believed the Director had overreacted to the situation; and that two acknowledged they had done exactly as those expelled, and that a closer review would have revealed that most students had done the same.

l. Enclosure (9) is the case of another member of Class 2-95, which the Board reviewed when they considered Petitioner's case.

m. Enclosure (10) is Petitioner's Official Military Personnel File.

4. After the Board had completed its deliberations on Petitioner's case, the Board's staff forwarded Mr. Leeman's E-mail at enclosure (8) to the Chairperson of the PERB for a ruling as to whether it warranted PERB reconsideration. By E-mail at enclosure (11), the Chairperson replied that PERB would not reconsider, expressing concern as to whether the class members contacted had provided letters (they had not).

#### CONCLUSION:

Upon review and consideration of all the evidence of record, and notwithstanding the contents of enclosures (2), the Board finds an injustice warranting removal of the contested fitness report.

Despite the reviewing officer's comments, the Board finds there was confusion as to what was permitted. In their view, the statement from the class instructor at enclosure (4) serves only to underscore this. The Board further feels that Petitioner was given too little time to prepare a rebuttal statement to the contested report, and that his disenrollment was too harsh under the circumstances. They consider the input of the other class members documented at enclosure (8) to be persuasive in supporting these findings.

In light of the above, the Board recommends the following corrective action:

#### RECOMMENDATION:

a. That Petitioner's naval record be corrected by removing the following fitness report and related material:

Date of Report	Reporting Senior	Period From	of Report To
2Mar95	 USMC	9Jan95	2Mar95

b. That there be inserted in his naval record a memorandum in place of the removed report, containing appropriate identifying data concerning the report; that such memorandum state that the report has been removed by order of the Secretary of the Navy in accordance with the provisions of federal law and may not be made available to selection boards and other reviewing authorities; and that such boards may not conjecture or draw any inference as to the nature of the report.


c. That the magnetic tape maintained by Headquarters Marine Corps be corrected accordingly.

d. That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries or material be added to the record in the future.

e. That any material directed to be removed from Petitioner's naval record be returned to this Board, together with a copy of this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.

5. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN  
Recorder

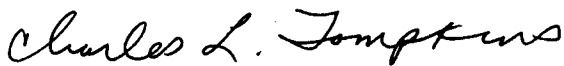
  
JONATHAN S. RUSKIN  
Acting Recorder

6. The foregoing report of the Board is submitted for your review and action.

  
W. DEAN PFEIFFER

Reviewed and approved:

JAN 24 2000



Charles L. Tompkins  
Deputy Assistant Secretary of the Navy  
(Personnel Programs)



DEPARTMENT OF THE NAVY  
HEADQUARTERS UNITED STATES MARINE CORPS  
2 NAVY ANNEX  
WASHINGTON, DC 20380-1775

IN REPLY REFER TO  
1610  
MMER/PERB  
18 Jul 97

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF  
NAVAL RECORDS

Subj: MARINE CORPS PERFORMANCE EVALUATION REVIEW BOARD (PERB)  
ADVISORY OPINION ON BCNR APPLICATION IN THE CASE OF GUNNERY  
SERGEANT [REDACTED], USMC

Ref: (a) GySgt [REDACTED] Form 149 of 16 May 97  
(b) MCO P1610.7C w/Ch 1-6

1. Per MCO 1610.11A, the Performance Evaluation Review Board, with three members present, met on 17 July 1997 to consider Gunnery Sergeant [REDACTED]'s petition contained in reference (a). Removal of the fitness report for the period 950109 to 950302 (TD) was requested. Reference (b) is the performance evaluation directive governing submission of the report.
2. The petitioner contends that the events and circumstances which led to his disenrollment from the Advanced Course Class 2-95 were unjust. It is his position that he was not involved in plagiarism as alleged, but merely misunderstood guidance given in relation to an assignment to complete a JAG Manual Investigation. Finally, the petitioner objects to the Reporting Senior's violation of reference (b) in not allowing him five days in which to prepare his official statement of rebuttal. To support his appeal, the petitioner offers statements from fellow Marines, statements concerning course critiques, and a letter from his legal counsel [REDACTED].
3. In its proceedings, the PERB concluded that the report is both administratively correct and procedurally complete as written and filed. The following is offered as relevant:
  - a. While the petitioner may not have been provided five days to submit his rebuttal statement, the Board notes that his comments attached to the challenged fitness report succinctly state his concerns. Those concerns and issues, however, were thoroughly resolved by the Reviewing Officer (Lieutenant Colonel [REDACTED]) who, in the final analysis, concurred in the Reporting Senior's decision/action to effect the petitioner's disenrollment.
  - b. The petitioner's point of contention in seeking elimination from his official record of the fitness report is his dismissal from the school for plagiarism, and his belief that the action was unjust. Nevertheless, the Reporting Senior merely reported the facts, nothing more or less. To this end, the Board offers that the petitioner would be better served by seeking relief of the incident via an Article 138, UCMJ complaint of Wrongs. Unless and until a formal fact-finding investigation determines that the petitioner's disenrollment, as well as the disenrollment of the six other staff noncommissioned officers, was incorrect and unjust, removal of the fitness report is simply not warranted.

Subj: MARINE CORPS PERFORMANCE EVALUATION REVIEW BOARD (PERB)  
ADVISORY OPINION ON BCNR APPLICATION IN THE CASE OF GUNNERY  
SERGEANT [REDACTED] USMC

4. The Board's opinion, based on deliberation and secret ballot vote, is that the contested fitness report should remain a part of Gunnery Sergeant [REDACTED]'s military record.
5. The case is forwarded for final action.

[REDACTED]  
[REDACTED]

Chairperson, Performance  
Evaluation Review Board  
Personnel Management Division  
Manpower and Reserve Affairs  
Department  
By direction of the Commandant  
of the Marine Corps